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INTERVIEW WITH CHAIRWOMAN EDITH RAMIREZ[1]

By Ronan P. Harty

What are the principal items on your competition agenda as Chairwoman?

I have focused on the healthcare and technology sectors since I first joined the Commission in 2010, and those sectors continue to be a priority for me as Chairwoman. As is well known, these have been important priorities for the Commission for many years. Let me say a few words about each area.

Healthcare accounts for over 17% of GDP, and study after study tells us that vigorous competition in healthcare markets reduces costs, improves quality, and expands access for consumers. The Commission has a great record promoting competition in healthcare markets. Our Supreme Court victory in the *Actavis* case will make it easier to challenge anticompetitive pay-for-delay settlements. In addition to pressing forward with two ongoing actions, including *Actavis*, we continue to look carefully at settlements filed under the Medicare Modernization Act to determine whether there are other enforcement actions we should pursue in light of the Supreme Court's ruling. Preventing anticompetitive provider consolidation is another healthcare priority that has deep roots at the Commission. While hospital mergers can generate important efficiencies that benefit consumers, we will continue to look carefully at acquisitions that are likely to enhance market power.

Promoting competition in high-technology markets is also a priority. Innovation drives economic growth and expands consumer welfare. Innovation also plays a central role in the competitive dynamics of high-tech markets. Firms

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[1] Edith Ramirez is Chairwoman of the U.S. Federal Trade Commission. She was appointed to the FTC by President Obama and was sworn in as a Commissioner on April 5, 2010. She was designated to serve as Chairwoman effective March 4, 2013. Prior to joining the Commission, Ramirez was a partner in the Los Angeles office of Quinn Emanuel Urquhart & Sullivan LLP. She graduated from Harvard Law School *cum laude* (1992) and holds an A.B. in History *magna cum laude* from Harvard University (1989).

in this sector are more likely to compete on the basis of new products and business models rather than on price. So the risk of harm to competition and consumers through a lessening of incentives to innovate tends to be more acute. Consistent with our 2010 Horizontal Merger Guidelines, we will be on the lookout for transactions in this area that raise competitive concerns. Of course, evaluating competitive effects in rapidly evolving markets requires the Commission to make educated predictions about the future. But that's something we do every day when we evaluate mergers in a variety of industries, and is not something we can avoid where the competitive landscape is shifting more rapidly. We will also continue to take a hard look at exclusionary tactics that discourage entry from nascent rivals. Our staff has a wealth of experience in both merger and conduct enforcement in high-technology markets, and the Commission has demonstrated its ability to make tough calls based on the evidence in each matter, pursuing a challenge against Intel for exclusionary tactics in 2009, while voting unanimously to close its investigation of Google's product design decisions in 2012.

My policy agenda also tracks these interests. The Commission's unique advantage as a competition and consumer protection agency rests in part on our expertise in research and policy analysis, and our authority to collect nonpublic information to conduct industry studies. We can often accomplish as much for consumers through policy and advocacy as we can through enforcement. The Commission, for example, has always taken a leadership role on policy issues at the intersection of competition and intellectual property, and I hope to build on that record during my tenure.

Our proposed study of patent assertion entities is one important project in this area. The available evidence suggests the PAE activity may be affecting incentives to innovate and compete in ways that we do not yet fully understand. We know that litigation activity by PAEs is on the rise, but we have little more than anecdotal evidence on PAE activity outside of the courtroom. Under Section 6(b) of the FTC Act, we have the authority to collect nonpublic

information to conduct industry studies, and last fall the Commission voted unanimously to issue a Federal Register Notice seeking comment on a proposed PAE study focusing on the economic costs and benefits of PAE activity. We are completing our analysis of the nearly 70 comments we received and will soon be seeking OMB approval to proceed with the proposed study. The Commission is uniquely positioned to expand the empirical picture on the costs and benefits of PAE activity. We have a talented and dedicated team of lawyers and economists working on this study, and I am excited about moving forward with it.

While the Commission has always been active when it comes to hospital mergers, we are also seeing challenges to physician acquisitions, for example the Reno consent last year and the St. Luke's litigation. Do you anticipate continued active enforcement in this area? Many of these types of acquisitions (physician acquisitions) do not meet HSR thresholds. So, how do you ensure that you are able to review such acquisitions?

The FTC will continue to carefully review all types of combinations between healthcare providers. As I've already noted, we have good evidence that mergers between providers that enhance market power can increase costs and reduce quality and access to healthcare services. While these acquisitions can also generate efficiencies, where we have evidence that a merger is likely to enhance market power, parties must be able to verify any efficiency claims and show that the efficiencies are merger-specific and of a character and magnitude that would outweigh any likely anticompetitive effects in the relevant market.

In the *St. Luke's* case, the court carefully considered whether efficiencies provided a defense to the Commission's challenge and concluded they did not. St. Luke's acquisition of the Saltzer Medical Group would have combined the largest provider of adult primary care services in Nampa, Idaho with its closest rival in a very concentrated market. The parties claimed that the merger would have created valuable efficiencies by permitting more integrated patient care and greater sharing of electronic medical records. While the court was persuaded that team-based care and shared electronic records can improve quality and reduce costs, it concluded that the parties could have achieved those same efficiencies

through collaborative arrangements short of a merger. So the court correctly concluded that the merger was unlawful.

As to your point about reporting thresholds, it is true that small provider acquisitions often fall below HSR reporting thresholds. However, we typically learn about potentially problematic mergers from a variety of sources, including state attorneys general, commercial health plans, others in the marketplace, media reports, and our own monitoring. And we make sure – through publications like this and other public engagement – that our views about the potential anticompetitive risks of these combinations are well known to all participants in healthcare markets.

The FTC has a reputation as an agency that works effectively and in a bipartisan way. That's not always the case in Washington. What's the FTC's recipe for success?

As an independent agency with important law enforcement responsibilities, we take great pride in our bipartisan and consensus-oriented culture. While my colleagues and I may at times see things differently, we work hard to understand one another's perspectives and always aim for consensus. We are all committed to protecting consumers and promoting competition, and the vast majority of our decisions are unanimous. But let me also emphasize that the FTC has a great reputation mainly due to our talented and hardworking staff. Not only are they on the front lines in everything we do, but it is also the high quality of their work that enables informed dialogue among Commissioners, including in those instances when we don't all agree on the outcome.

Are there any ongoing FTC studies of the effects of your merger enforcement program in healthcare or other areas?

I think retrospectives are an important tool that can be used to improve the quality of merger enforcement programs. Done well, retrospectives may be able to tell us whether we are providing consumers with good value for their enforcement dollar. They can also help us educate courts. As is well known, retrospectives helped the FTC reinvigorate its hospital merger enforcement

program about a decade ago. Retrospectives that focus on remedies, particularly whether divestitures are effective in restoring the competition lost through an otherwise anticompetitive transaction, can also help improve merger enforcement. The Commission's divestiture policies today are grounded in part on what we learned from our 1999 divestiture study.

At the same time, merger retrospectives are resource intensive, and it is not easy to design a study that provides us with unbiased answers to the relevant enforcement questions. But good retrospectives can make us a more effective agency and I am working with our Bureaus to identify possible projects.

What are your views on potential competition? Typically, we see potential competition cases in the pharma and medical device industries but the FTC recently obtained an enforcement action in the Nielsen/Arbitron matter. Does that signal that we are likely to see more potential competition cases in the future?

I think *Nielson/Arbitron* can be seen as an example of the Commission's commitment to promoting competition in the high-tech sector. We challenge mergers where the evidence provides us with a sound basis to believe that competitive harm is likely, and that was the case in *Nielson/Arbitron*. Internal documents and statements from the parties showed that the parties had each invested significant time and resources to develop an audience measurement product that covered multiple platforms and were beginning to offer them to customers. There was broad consensus among media companies and advertisers that Nielsen and Arbitron were the two firms best positioned to develop a cross-platform measurement product in the foreseeable future that would satisfy emerging demand. The evidence also showed that these products would likely compete directly for business. Taken together, the evidence provided ample reason to believe the transaction was likely to harm competition, and I was very comfortable supporting a challenge and settlement in that matter.

We have seen a number of transactions in recent years in the IT sector involving the sales of large patent portfolios. Is there something unique about the Section 7 analysis when the buyer is a patent assertion entity?

We apply the same basic analytic tools and economic principles to evaluate mergers irrespective of the business models of the transacting parties. As always, we are concerned with transactions that enhance market power or facilitate the exercise of market power. In a situation involving the acquisition of a large patent portfolio, the relevant question under Section 7 would be whether the transfer is likely to enhance market power.

For example, with regard to the upstream technology market, we would want to understand whether the transaction combined important substitute patents, and whether there were any merger specific efficiencies associated with the combination. We would also ask if the patents at issue are important to competition in one or more downstream markets, and, if so, whether the buyer's incentives to license those patents are likely to differ from those of the seller post-acquisition and how that change would be likely to affect downstream competition. The downstream product market analysis would follow the same basic framework we apply to other vertical mergers, such as the GE/Avio transaction earlier this year.

In some cases, the incentives of PAEs to assert and license patents may differ from those of operating companies. Operating companies that are themselves vulnerable to infringement claims may refrain from asserting patents against entities that could strike back. Since PAEs are not generally susceptible to countersuit, the transfer of a large portfolio from an operating company to a PAE might lead to more assertion activity. If PAEs assert these patents against firms that have already embedded the patented technology in products, the transfer could also increase the risk of patent hold-up, which may distort incentives to innovate and reduce consumer welfare.

I am committed to using all of the agency's tools to protect consumers from harmful PAE activity, including using our antitrust enforcement authority to

stop anticompetitive portfolio acquisitions by PAEs. However, it is also important to understand that antitrust cannot provide a solution to some of the broader competition policy risks that may be associated with PAE acquisitions. To reduce the threat of patent hold-up more broadly throughout the marketplace, policymakers should continue to pursue reforms that improve the patent system.

Much has been said about Section 5 and there appears to be a clamoring from the bar and others for guidance on what is commonly called the Commission's "standalone" Section 5 authority. Does the Commission plan on issuing a policy statement on Section 5? Why or why not?

The Commission is clearly engaged on this issue and several of us have explained our views publicly. I favor developing Section 5 enforcement principles using a common law approach. Congress deliberately drafted Section 5 broadly to provide the agency with the administrative flexibility to address unfair methods of competition that would have been difficult to define adequately in advance and that would necessarily change over time with economic learning and an evolving competitive landscape. Courts have successfully developed the contours of both the Sherman and Clayton Acts using a case-by-case approach, and I believe the Commission can and should follow that approach for Section 5.

While I recognize that a predictable enforcement environment promotes economic growth, an enforcement policy that places too much weight on certainty has economic costs as well. As I noted in a speech I gave at a recent symposium at GMU, an approach that is excessively concerned about over-enforcement does not serve the marketplace as whole. While erring on the side of under-enforcement may provide certainty to incumbents, it can impose a great deal of uncertainty on nascent rivals seeking to challenge a dominant firm or business model.

In my view, our enforcement actions themselves provide useful guidance for the business community. Our most recent cases show that the Commission will challenge conduct that courts may conclude falls outside the scope of the Sherman Act, but only where we have reason to believe the conduct is likely to

cause harm to competition and where the harm outweighs cognizable efficiencies. We applied this very familiar rule of reason approach in our *Google/MMI* and *Bosley* actions last year, and it is the standard that I think ought to be applied in future actions.

You were in Beijing recently to meet with MOFCOM. What is your impression of the way in which China is handling merger reviews? Is there anything you would like to see them change?

We have followed the evolution of MOFCOM's merger review process with great interest. The FTC, together with the Department of Justice, provided MOFCOM with input on the merger provisions of the draft Anti-Monopoly Law through the consultation process prior to adoption of the law in 2007. We have been in regular contact since that time regarding implementation, and even more so since 2011 when we entered into a Memorandum of Understanding with MOFCOM and the other two Chinese competition agencies. I am impressed that, in just over five years, MOFCOM's Antimonopoly Bureau has built the capacity to analyze complex merger issues with skill. AMB staff are diligent and appear eager to learn from the experiences of enforcers around the world.

With that said, I am concerned about some aspects of MOFCOM's review process. Merger review goes more slowly in China than in most other jurisdictions with a pre-merger notification program. MOFCOM has reported that 87% of the mergers they review move to a second phase investigation, similar to a second request here, even though ultimately MOFCOM imposes conditions on less than 5% of all reported transactions. In most jurisdictions, less than 10% of reported transactions go to a second stage investigation, with the percentage below 5% in the United States. These numbers suggest that a large number of transactions that do not pose competitive issues are subject to a lengthy review in China, imposing costs on the merging parties and consuming MOFCOM's limited enforcement resources. Recently, MOFCOM released rules on "simple" transactions, which may make it easier for MOFCOM to complete many more investigations within the initial 30-day review period. I hope these new rules will

allow MOFCOM to focus its resources on those mergers that pose genuine competitive concerns.

I am also concerned about the role that industrial policy plays in MOFCOM's merger enforcement program. The AML expressly requires that MOFCOM take economic development into account in merger review. As a matter of practice, MOFCOM will often consult with other ministries, including those responsible for designing and implementing China's industrial policies. In my view, antitrust enforcement should focus on promoting competition and consumer welfare, and should not be used as a tool for industrial policy. However, where an enforcement agency is obliged to consider other goals, it is particularly important to the global regulatory environment that the agency do so in a manner that is transparent.

Are we seeing greater convergence in international merger enforcement? Does the Commission plan any initiatives in this area?

The FTC has worked hard to reduce the burdens on parties that can be associated with differences in merger analysis and procedures across jurisdictions, and I think the trend toward convergence is continuing. The FTC promotes convergence on sound antitrust principles through our work in multilateral organizations and our bilateral relations with counterpart agencies around the globe.

By way of example, as you touched on earlier, I recently participated in the second FTC/DOJ Joint Dialogue with China's three competition agencies, at which senior officials addressed antitrust policy and practice issues, including those related to merger review, timing, and remedies. We also just concluded a trilateral meeting with the Canadian and Mexican competition agencies and held bilateral meetings over the past year with the European Commission, Japan, and India at which we discussed merger policy convergence and cooperation. Additionally, through consultations and cooperation on merger cases under concurrent review, we have addressed key policy and procedural issues that have

helped bring our approaches to merger policy and practices closer. We also continue to strengthen case cooperation and coordination to reach compatible results on individual cases of mutual interest. *Thermo Fisher/Life Technologies* is a recent example of a case in which we cooperated with antitrust agencies in many jurisdictions, including Australia, Canada, China, the European Union, Japan, and Korea to reach compatible results on a global scale. We have also been active with technical assistance to a broad array of young agencies.

The FTC remains committed to working towards even greater convergence of competition policy and practice internationally, and we look forward to working with the Antitrust Section and others to do so.

Justice Brandeis once said, "You can judge a person better by the books on his shelf than by the clients in his office." What books have you been reading recently?

I hope Judge Brandeis would view me as a good commissioner, as my daily reading mainly consists of staff memos, white papers and case law. I wish I had time to read more widely and am always on the lookout for good books. The last book I read was *La Sombra del Viento* by Spanish author Carlos Ruiz Zafón, which I thoroughly enjoyed. I'm about to start *Quiet* by Susan Cain, which I am looking forward to reading. It was recommended to me a while ago, and I was finally prompted to buy it after listening to Cain speak at the HLS "Celebration 60" conference last fall. Another book that I hope to get to soon is *Thanks for the Feedback* by Douglas Stone and Sheila Heen. It relates to an issue that I have given significant thought to in the past while working with young law firm associates, and am thinking a great deal about now at the FTC – how to ensure that staff are fully engaged and that those of us who are managers are effective supervisors and mentors. *Thanks for the Feedback* was recommended to me as having useful insights on that subject.

If anyone has any other good reading suggestions, I would love to hear them.